IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

MICHAEL H. COOK, Plaintiff, vs. The CITY OF ELKADER, IOWA; BRAD CARNES; STEVE MCCORKINDALE; BETTY LANDIS; and THOMAS DIERS, Defendants.	No. C03-1029 **ORDER**

This matter comes before the court pursuant to defendants' November 9, 2004 motion for summary judgment (docket number 34). The parties have consented to the exercise of jurisdiction by a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c).

The plaintiff, Michael Cook, brings claims against the City of Elkader, Iowa, Brad Carnes, Steve McCorkindale, Betty Landis, and Thomas Diers, arising out of the termination of his employment as the public works director for the City of Elkader.[1] Specifically, the plaintiff alleges that the defendants' failure to assure his safety in the workplace violated his substantive due process rights. The plaintiff also alleges that his termination violated Iowa Code § 70A.29, the "whistle blower" statute, and violated public policy as it was in retaliation for exercising his First Amendment rights.[2] Finally, the

[1] At all material times, defendants Carnes, McCorkindale and Landis were members of the Elkader city council. Diers was the mayor of Elkader.

[2] The plaintiff's "whistleblower" claim was added pursuant to his second amended

(continued…)

plaintiff claims that he was fired prior to exhausting his 12 weeks of leave under the Family and Medical Leave Act of 1993, and in retaliation for exercising his rights under the FMLA. The defendants argue that the undisputed facts demonstrate that they are entitled to summary judgment on all of plaintiff's claims.

SUMMARY JUDGMENT

A motion for summary judgment may be granted only if, after examining all of the evidence in the light most favorable to the nonmoving party, the court finds that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. Kegel v. Runnels, 793 F.2d 924, 926 (8th Cir. 1986). Once the movant has properly supported its motion, the nonmovant "may not rest upon the mere allegations or denials of [its] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). "To preclude the entry of summary judgment, the nonmovant must show that, on an element essential to [its] case and on which it will bear the burden of proof at trial, there are genuine issues of material fact." Noll v. Petrovsky, 828 F.2d 461, 462 (8th Cir. 1987) (citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986)). Although "direct proof is not required to create a jury question, . . . to avoid summary judgment, 'the facts and circumstances relied upon must attain the dignity of substantial evidence and must not be such as merely to create a suspicion.'" Metge v. Baehler, 762 F.2d 621, 625 (8th Cir. 1985) (quoting Impro Prod., Inc. v. Herrick, 715 F.2d 1267, 1272 (8th Cir. 1983)).

---

[2](…continued)
complaint and jury demand, which was filed on January 10, 2005. The defendants' deadline to move for summary judgment on this claim is January 21, 2005. The fate of plaintiff's "whistleblower" claim will be decided in a separate order.

The nonmoving party is entitled to all reasonable inferences that can be drawn from the evidence without resort to speculation. Sprenger v. Fed. Home Loan Bank of Des Moines, 253 F.3d 1106, 1110 (8th Cir. 2001). The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. Id. Although it has been stated that summary judgment should seldom be granted in employment discrimination cases, summary judgment is proper when a plaintiff fails to establish a factual dispute on an essential element of her case. Helfter v. UPS, Inc., 115 F.3d 613, 615-16 (8th Cir. 1997). The standard for the plaintiff to survive summary judgment requires only that the plaintiff adduce enough admissible evidence to raise genuine doubt as to the legitimacy of the defendant's motive, even if that evidence did not directly contradict or disprove defendant's articulated reasons for its actions. O'Bryan v. KTIV Television, 64 F.3d 1188, 1192 (8th Cir. 1995). To avoid summary judgment, the plaintiff's evidence must show that the stated reasons were not the real reasons for the plaintiff's discharge and that the prohibited discrimination or retaliation was the real reason for the plaintiff's discharge. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 153 (2000) (quoting the district court's jury instructions).

STATEMENT OF MATERIAL FACTS[3]

The City of Elkader is a municipal corporation located in Clayton County, Iowa. PeopleService, Inc. is a Nebraska corporation which operates and maintains municipal water and waste water treatment facilities. Effective January 1, 1990, PeopleService, Inc. contracted to operate and maintain Elkader's municipal water and waste treatment facilities. Elkader and PeopleService entered into a renewed operation and maintenance agreement on June 23, 1999. The PeopleService employee assigned to manage, operate and maintain Elkader's water and waste water facilities was Charles "Chuck" Hansel.

[3]Where disputed, the facts are taken in a light most favorable to plaintiff, as the nonmoving party.

The plaintiff, Michael Cook, was hired by the City of Elkader on October 22, 1991 as a street worker. Approximately two years later, the plaintiff was promoted to street superintendent. In 1999, the job title was changed to public works director with no change in job responsibilities. After this change of title the plaintiff reported to the city administrator.

On November 26, 2000, the Clayton County Sheriff's Department received a report that Chuck Hansel was near the wastewater lagoon with a gun, threatening suicide. Ultimately, he was taken into custody and 17 shotgun shells were found on his person. The officers who found Hansel reported that Hansel had told them that there were "17 people he was going to take care of." According to the police report, the mayor and the council members were on Hansel's list. Hansel spent a week at Mercy Hospital in Dubuque where he received treatment for stress. Hansel's physician released him to return to work with no restrictions effective January 8, 2001. This incident was kept quiet and did not become common knowledge in the Elkader community.

On September 4, 2001, the City of Elkader hired Kim Werger as a water/streets employee, with half of Werger's salary to be paid from road use funds and half to be paid by the water and sewer department. According to the plaintiff, Werger performed street work for one day only. When he first learned of the arrangement concerning Werger's salary, i.e., the use of road use tax funds to pay part of Werger's salary, the plaintiff complained to then city administrator Ryan Heiar. The plaintiff also raised the issue with defendant Carnes in January 2002 and expressed his concerns regarding this matter once to defendant Diers and once to defendant McCorkindale in passing.

In the summer of 2001, Hansel joked with members of the city crew, who were sitting around the shop, about his list of 17 people, saying "I've got my list, and going down there for a week certainly isn't going to take it away from me." On at least one other occasion, possibly two, Hansel made similar comments to the plaintiff in private conversation. The plaintiff believed that he was on Hansel's "list" of 17 people. Hansel

also made comments in plaintiff's presence that "I'm not suicidal, I'm homicidal. I don't want to hurt me, it's just all these idiots around me." Comments about the "list" and being "homicidal" were made in the plaintiff's presence approximately half a dozen times beginning in the fall of 2001. Also during this time and into early 2002, Hansel made comments to Mr. Cook such as "f--k you," made references to looking at morgue pictures on the internet, and extensively described his knife collection, including a "Special Forces" knife. Mr. Hansel also discussed the November 2000 episode with Mr. Cook, describing where he kept the shotgun, the smell of the grass and the sounds of traffic overhead when he was hiding under the bridge. Hansel remarked about thinking how his family would deal with the events after he finished "killing those f--ers on the list." As a result of these comments, which the plaintiff characterizes as "veiled" threats, the plaintiff felt threatened. Hansel made similar comments to Diers, which Diers testified he took as being made in a joking manner. The plaintiff never reported Hansel's "threats" to any law enforcement agency or to anyone at PeopleService.

In the fall of 2001, both Hansel and his wife, Marcia, took out papers to run for the Elkader City Council. Until this time, the plaintiff and Hansel had a satisfactory working relationship. Upon hearing of Hansel's intent to run for city council, the plaintiff approached defendant McCorkindale, a lawyer, with the Iowa Code and expressed concern whether Hansel should be able to run for council due to a conflict of interest, i.e., according to the plaintiff, Hansel was essentially a *de facto* employee of the city given the city's relationship with PeopleService. McCorkindale responded that it was a "grey area" and "the city could get around it if it was ever a problem." Cook disagreed with McCorkindale's assessment, but never voiced his concerns to anyone at the election commission or with state government. The plaintiff also expressed his concerns regarding the conflict of interest issue to then city administrator Ryan Heiar, defendant Carnes and others. Around this same time, the plaintiff approached Hansel directly regarding his intent to run for city council, questioning whether Hansel needed the extra stress in his life

and suggested that Hansel "maybe should just sit back and just enjoy life a little bit instead of looking for more stress and pressures." After this time, the plaintiff testified that he "started feeling direct fear from [Hansel] because of his veiled threats."

The plaintiff's wife, Cynthia Cook, publicly opposed the Hansels' candidacies for city counsel through a November 30, 2001 newsletter she authored in her capacity as an employee of Main Street Elkader, a nonprofit corporation. Both Marcia and Chuck Hansel believed that the plaintiff was actually behind his wife's opinion piece in the Mainstreet newsletter. Hansel was quoted in the Dubuque Telegraph Herald as saying that the executive director of Mainstreet [Cindy Cook] would have to answer for her negative campaigning and that he would not support Mainstreet until changes occurred.

Following an inconclusive general election in November 2001, Hansel was elected to the city council in a runoff election on December 4, 2001. Marcia Hansel was not elected. Hansel took his oath of at the January 14, 2002 city council meeting. Also at this meeting, Hansel criticized the plaintiff and sought to remove the plaintiff from his job and replace him with street worker Jerry Gamm.

At the January 28, 2002 council meeting, the plaintiff presented a project for a fitness trail and playground equipment in the city park. In the course of this meeting, Hansel lost his temper, verbally criticized the way the plaintiff was running the streets department, and accused [now] city administrator Greg Crocker of being the plaintiff's "puppet." According to the plaintiff, Hansel was screaming, called him several profane names, pointed at him and said that he was taking up space and needed to get out of here because streets worker Jerry Gamm needed "that job." During this incident Hansel stood up, sat back down, took his glasses off and put them back on repeatedly, and pounded on the table. According to the plaintiff, Hansel also yelled that Kim Werger would never work for the plaintiff. Hansel then left the building, slamming the door. The council members waited for several minutes before leaving the building and the mayor commented that he did not want to be the first one out the door in case Hansel was waiting for them.

The mayor also told the plaintiff that he was glad that the plaintiff was now at the top of Hansel's list because it took the focus off of him. The mayor made a similar comment to plaintiff's wife. The mayor testified that these comments were made in a joking manner.

Following this meeting, defendant McCorkindale counseled Hansel that he should not be "blowing up" at council meetings. Around this same time, the plaintiff saw Hansel in the city shop, undermining the plaintiff's authority by telling the street workers to follow his directions, not the plaintiff's. The plaintiff told Hansel not to give countermanding orders to his crew. Hansel did not respond.

On January 29, 2002, the city administrator called the plaintiff to his office and told him that there would be a special meeting on January 31, 2002 with the city crew, council members and the mayor to address the plaintiff's problems with Hansel. The city administrator told the plaintiff that they "felt strongly enough about it that if they couldn't get a handle on this thing with Chuck, that they were prepared to ask Peoples to remove him from Elkader and give him a different operator or look at dropping the Peoples' contract, whatever it took to stop this." According to the plaintiff, the city was "willing to back [him] up on it."

On January 31, 2002, the city administrator, defendants Carnes, and McCorkindale, and Hansel met with the plaintiff and public works employee Loren Amsden. Hansel was quiet and calm at this meeting, not saying much of anything. According to the plaintiff, Amsden either did not recall or was too afraid to discuss the issues in front of Hansel. As Amsden did not support the plaintiff, McCorkindale concluded that the plaintiff was the problem, not Hansel. The plaintiff went to work the following day, which was a Friday, but did not report to work on the next Monday, February 4, 2002. The plaintiff suffered a breakdown within a week or so of the January 28, 2002 council meeting. He became physically ill with symptoms including vomiting, shaking hands, fear of death, general weakness, heart pounding, numbness, unsteadiness, flushed face, dizziness, indigestion and crying.

On Friday, February 8, 2002, the plaintiff saw Dr. Kenneth E. Zichal, his family doctor, complaining that Hansel was "causing considerable angst" with threats to the plaintiff's health and well being. Dr. Zichal did not prescribe any medication for the plaintiff, but he did write a letter to the Elkader City Council to the effect that he had advised the plaintiff that "effectively immediately . . . a paid leave of absence would be in his best interest for the next 30 days." The plaintiff next saw Dr. Zichal on February 25, 2002. During this visit, Dr. Zichal noted that the plaintiff was "actually quite a bit calmer" and scheduled a follow-up appointment in one month. The plaintiff did not follow up with Dr. Zichal in one month, bit did see him again on June 15, 2002.

During the third week of February, 2002, plaintiff and the city administrator met at the plaintiff's home (at plaintiff's request) to discuss ways of returning the plaintiff to work. At this meeting, the city administrator told the plaintiff that three members of the city council wanted him fired. The city referred the plaintiff to undergo a psychological evaluation with Dr. George M. Harper, which occurred on March 20, 2002. At the February meeting, the city administrator also told the plaintiff that his failure to attend this evaluation would be used as an excuse by the council to fire him.

On March 7, 2002, plaintiff's [then] attorney, Kathleen M. Neylan, wrote a letter to the Elkader city administrator, requesting that he prepare a job description for the plaintiff's position and that Cook's leave of absence be extended. In response, a draft job description for the public works director position was prepared. On March 25, 2002, the city adopted a family and medical leave policy authorizing up to 12 weeks of family and medical leave and providing that an employee returning from leave is entitled to return to the position held when the leave began. On April 8, 2002, Dr. Harper reported that the plaintiff was suffering from "Anxiety Disorder/Relational Problem" and recommended that the plaintiff return to work "once his safety, both physical and psychological, can be assured by the City of Elkader." On April 24, 2002, Dr. Harper authored a "Certification for Employee Serious Health Condition" under the Family and Medical Leave Act of

1993 (FMLA). The city approved the plaintiff's request for leave under its family and medical leave policy for 12 weeks through April 28, 2002. On April 25, 2002, the city administrator wrote a letter to the plaintiff outlining proposed accommodations to address the concerns raised by Dr. Harper to enable the plaintiff to return to work, and advising the plaintiff that he had exhausted his entire 12 weeks of FMLA leave and was expected to return to work on April 29, 2002. The proposal contained a space for Hansel's signature, but Hansel ultimately refused to sign the proposal.

Following the expiration of plaintiff's FMLA leave, the city approved the plaintiff's request for "sick days from April 29, 2002 - May 6, 2002 for the 40 hours sick leave remaining on 4/30/02." Following the expiration of this sick leave, the city approved the plaintiff's request to use his "vacation days and/or personal days from May 6, 2002 - May 15, 2002." The plaintiff personally contacted the city administrator in May 2002 to try to work out a plan for his return to work. The city administrator again told the plaintiff that the council wanted him fired and that it was too late to work something out. The mayor was aware of the fact that the plaintiff wanted to return to work, but testified that he did not want the plaintiff to return to work because he had worn out his welcome by taking time off. The mayor also testified that he did not want the plaintiff to return to work because "the rest of the crew would have been just as happy if he didn't come back."

On May 17, 2002, the city's [then] attorney Bill Sueppel wrote to Neylan, advising that the plaintiff had used all FMLA leave, sick leave, and vacation days, and was now on unpaid leave. Sueppel's letter stated that Hansel "has assured the City that Mr. Cook's safety will not be threatened, either physically or psychologically." Sueppel's letter also advised that "if Mr. Cook does not return to work by May 28, 2002, the City would consider his failure to return a voluntary quit and [the city] intends to take steps to fill the position of Public Works Director." On May 23, 2002, Neylan responded to Sueppel's letter, noting that the written proposal remained unsigned by Hansel. On May 24, 2003, Sueppel wrote a letter to Neylan setting forth the city's position that it had complied with

Dr. Harper's requirements for the plaintiff to return to work and reaffirming the city's intention to consider the plaintiff's failure to return to work by May 28, 2002 a voluntary quit. The plaintiff did not return to work. On May 29, 2002, Neylan wrote a letter to Sueppel demanding that the "draft" job description be finalized with changes that she had requested from the city administrator. On May 30, 2002, Sueppel replied to Neylan, advising her that the "draft" job description was "the" job description for the public works director, reiterating the city's position that it had met Dr. Harper's requirements for the plaintiff returning to work, and reaffirming the city's intention to consider the plaintiff's failure to return to work as a voluntary quit.

On Monday, June 3, 2002, the Elkader city counsel met in special session. McCorkindale moved to accept the "voluntary quit" of the plaintiff, which the council approved unanimously. On June 4, 2002, the city administrator wrote a letter to the plaintiff advising him of the council's action. Hansel died on October 11, 2002 as the result of a brain aneurysm.

CONCLUSIONS OF LAW

42 U.S.C. § 1983 - Substantive Due Process

"To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." West v. Atkins, 487 U.S. 42, 48 (1988). For the plaintiff to defeat defendant's motion for summary judgment on his substantive due process claim, he must "adequately prove the essential elements of § 1983 liability: (1) violation of a constitutional right, (2) committed by a state actor, who (3) acted with the requisite culpability and causation to violate the constitutional right." Shrum v. Kluck, 249 F.3d 773, 777 (8th Cir. 2001). With respect to the second element, a city may be accountable for the unconstitutional acts of its employees if a constitutional deprivation results from either "(1) implementation or execution of an unconstitutional policy or custom by [city] officials or employees, or (2) in the event of a

substantive due process violation, an executive action by a [city] official." Id. at 778 (internal citations omitted).

The plaintiff alleges that Hansel, as a state actor and policy making member of the Elkader city council, violated the plaintiff's substantive due process rights by his outrageous and/or irrational threats to Mr. Cook's physical safety, which resulted in the plaintiff's inability to work due to anxiety. The plaintiff claims that the defendants violated his substantive due process rights by failing to take any action to assure Mr. Cook's safety, given the known threats Hansel had made toward the plaintiff.

The defendants argue that summary judgment must enter on the plaintiff's due process claim as the plaintiff cannot identify a municipal policy or custom that caused his alleged injury. The defendants further argue that the plaintiff's continued employment with the city is not so "fundamental" as to be afforded substantive due process protection, and that the defendants actions in this case are not, as a matter of law, sufficiently egregious or outrageous, as to fairly be said to shock the contemporary conscience, which is required to establish liability under 42 U.S.C. § 1983.[4]

"In order to succeed, a complaint for a violation of substantive due process rights must allege acts that shock the conscience, and merely negligent acts cannot, as a

[4]The existence of an identified liberty or property interest is irrelevant as the plaintiff's substantive due process claim is based on his assertion that the defendants' actions toward the plaintiff "shock the conscience." See DeLeon v. Little, 981 F. Supp. 728, 735 (D. Conn. 1997) ("The Supreme Court has enunciated two alternative tests by which substantive due process is examined. Under the first test, the plaintiff must prove that the governmental body's conduct's conduct 'shocks the conscience.' Under the second test, the plaintiff must demonstrate a violation of an identified liberty or property interest protected by the Due Process Clause.") (internal citations omitted); Singleton v. Cecil, 176 F.3d 419, 425 (8th Cir. 1999) (en banc) (noting in its analysis of an alleged violation of an identified liberty interest claim the "alternate way" to assert a due process claim, i.e., that the government's actions "shock the conscience").

constitutional matter, do that: To hold otherwise 'would trivialize the centuries-old principle of due process of law.'" S.S. v. McMullen, 225 F.3d 960, 965 (8th Cir. 2000) (quoting Daniels v. Williams, 474 U.S. 327, 332 (1986)); County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998) (confirming that the "cognizable level of executive abuse of power" for substantive due process purposes is that which "shocks the conscience").

> It should not be surprising that the constitutional concept of conscience shocking duplicates no traditional category of common-law fault, but rather points clearly away from liability, or clearly toward it, only at the ends of the tort law's spectrum of culpability. Thus, we have made it clear that the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm. In Paul v. Davis, 424 U.S. 693, 701, 96 S. Ct. 1155, 1160-1161, 47 L. Ed. 2d 405 (1976), for example, we explained that the Fourteenth Amendment is not a "font of tort law to be superimposed upon whatever systems may already be administered by the States," and in Daniels v. Williams, 474 U.S. at 332, 106 S. Ct. at 665, we reaffirmed the point that "[o]ur Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." We have accordingly rejected the lowest common denominator of customary tort liability as any mark of sufficiently shocking conduct, and have held that the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process. It is, on the contrary, behavior at the other end of the culpability spectrum that would most probably support a substantive due process claim; conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level.

Id. (internal citations omitted). See also Shrum, 249 F.3d at 778 ("The purpose of such a stringent standard is to prevent § 1983 liability from collapsing into state tort law or into respondeat superior liability, an intent not contemplated by § 1983."). Ultimately, the

government action complained of must be "sufficiently outrageous" or "truly irrational." Young v. City of St. Charles, MO, 244 F.3d 623, 628 (8th Cir. 2001). See also Hawkins v. Holloway, 316 F.3d 777, 780 (8th Cir. 2003) ("In the context of allegations that a state official has abused his executive power, the test we employ to ascertain a valid substantive due process violation is 'whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'") (quoting County of Sacramento, 523 U.S. at 548). Even gross negligence is not actionable under 42 U.S.C. § 1983. S.S., 225 F.3d at 965 (citing Sellers v. Baer, 28 F.3d 895, 902-03 (8th Cir. 1994)). See also Avalos v. City of Glenwood, 382 F.3d 792, 799 (8th Cir. 2004) ("Mere negligence is not conscience-shocking and cannot support a claim alleging a violation of a plaintiff's substantive due process rights.").

A municipality cannot be held liable under § 1983 for an injury inflicted solely by its employees on a theory of respondeat superior. Springdale Educ. Ass'n v. Springdale Sch. Dist., 133 F.3d 649, 651 (8th Cir. 1998). In the absence of conscience-shocking conduct by a government official, a plaintiff seeking to impose municipal liability must identify either an "official municipal policy or a widespread custom or practice that caused the plaintiff's injury." Id. "The identification of an official policy as a basis upon which to impose liability ensures that a municipality is held liable only for constitutional deprivations 'resulting from the decisions of its duly constituted legislative body or for those officials whose acts may fairly be said to be those of the municipality.'" Id. (quoting Board of County Comm'rs of Bryan County, Okl. v. Brown, 520 U.S. at ---, 117 S. Ct. at 1388). "Although municipal liability for violating constitutional rights may arise from a single act of a policy maker, that act must come from one in an authoritative policy making position and represent the official policy of the municipality. McGautha v. Jackson County, MO, Collections Dept., 36 F.3d at 53, 56 (8th Cir. 1994). In this context, a "policy" means "an official policy, a deliberate choice of guiding principle or

procedure made by the municipal official who has final authority regarding such matters." Mettler v. Whitledge, 165 F.3d 1197, 1204 (8th Cir. 2002).

Actions performed pursuant to a municipal "custom" not specifically approved by an authorized decisionmaker "may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law." Id. To prevail on a "custom" claim, the plaintiff must prove:

> (1) The existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees;
>
> (2) Deliberate indifference to or tacit authorization of such conduct by the governmental entity's policymaking officials after notice to the officials of that misconduct; and
>
> (3) That plaintiff was injured by acts pursuant to the governmental entity's custom, i.e., that the custom was the moving force behind the constitutional violation.

Id. (citing Jane Doe "A" v. Special Sch. Dist. of St. Louis County, 901 F.2d 642, 646 (8th Cir. 1990)). If the City of Elkader actually instituted a policy or custom which deprived the plaintiff of his constitutional rights, then he must illustrate that the city's actions in so doing were taken with "deliberate indifference as to its known or obvious consequences." Shrum, 249 F.3d at 779 (quoting Brown, 520 U.S. at 398). See also Doe v. Gooden, 214 F.3d 952, 955 (8th Cir. 2000) ("The plaintiffs must show that the district officials received notice of a pattern of unconstitutional acts, demonstrated deliberate indifference to the acts, failed to take sufficient remedial action, and that such failure proximately caused the injury to the students.").

In resisting defendants' motion for summary judgment, the plaintiff does not argue the existence of a city policy or custom in support of his substantive due process claim. Rather, the plaintiff contends that Hansel's actions in making veiled threats toward his physical safety, calling him profane names, throwing temper tantrums at the council

meeting, undermining his authority with the street crew, etc. were outrageous and/or irrational, and that the defendants violated his right to substantive due process by failing to take action to assure the plaintiff's safety, given Hansel's actions. According to the plaintiff, the defendants' failure to assure his safety resulted in his inability to work, due to anxiety.

The court finds that neither Hansel's nor the defendants' actions were sufficiently conscience-shocking as to support the plaintiff's due process claim. Until January 14, 2002, when Hansel was sworn in as a member of the Elkader city council, he was not a "state actor" and the city had no "general affirmative obligation to protect [the plaintiff] from private violence." Avalos v. City of Glenwood, 382 F.3d 792, 798 (8th Cir. 2004).[5] See also Shrum, 249 F.3d at 781 ("As a matter of law, Elwood cannot be held responsible for failing to warn other potential employers of Kluck's suspected misconduct because the Due Process Clause does not obligate the state to protect an individual against private violence."). The plaintiff never performed any work for the city after January 29, 2002. Therefore, the plaintiff was subjected to, at most, two weeks of "veiled threats" from Hansel as a state actor, and the record indicates that the majority of the "threats" actually occurred prior to Hansel taking office. Nevertheless, even when coupled with Hansel's tirades at the January 14 and 28, 2002 council meetings, Hansel's actions cannot be said to "shock the conscience." The plaintiff himself testified that Hansel's threats were "veiled" and that Hansel never explicitly threatened him with physical violence. See Burton v. Livingston, 791 F.2d 97, 100 (8th Cir. 1986) (reversing district court's dismissal of prisoner's civil rights action against prison guard where guard was alleged to have pointed a lethal weapon at the prisoner, cocked it, threatened him with instant death, and the death threat was accompanied by a racial epithet - all of which was unprovoked by the prisoner). "The complaint described in plain words a wanton act of cruelty which, if it

[5]Neither exception to this rule, i.e, the state's duty to protect those in its custody or the "state-created danger" theory is applicable to this case.

occurred, was brutal despite the fact that it resulted in no measurable physical injury to the prisoner." Id. Moreover, Hansel never contacted the police to complain about Hansel's behavior. While Hansel's behavior was undeniably peculiar, immature, rude, offensive, volatile, inappropriate, etc., it was not so brutal or wantonly cruel as to constitute an actionable constitutional violation. See Hopson v. Fredericksen, 961 F.2d 1374, 1378 (8th Cir. 1992) ("Generally, mere verbal threats made by a state-actor do not constitute a § 1983 claim."). "We have held that a threat constitutes an actionable constitutional violation only when the threat is so brutal or wantonly cruel as to shock the conscience, or if the threat exerts coercive pressure on the plaintiff and the plaintiff suffers the deprivation of a constitutional right." King v. Olmsted County, 117 F.3d 1065, 1067-68 (8th Cir. 1997) (internal citations omitted) (finding threats to parents by social worker that the state would take their children away unless they cooperated were at worst "verbal harassment or idle threats" that are insufficient to "constitute an invasion of an identified liberty interest.").

When faced with similar and arguably more egregious facts, courts have consistently found no substantive due process violation. For example, in Hopson v. Fredericksen, 961 F.2d 1374 (8th Cir. 1992), a police officer uttered a racial slur to an arrestee and threatened to "'knock [Hopson's] remaining teeth out of his mouth' if he remained silent." Affirming the district court's directed verdict in favor of the police officer, the Eighth Circuit Court of Appeals found that the officer's actions failed to constitute a cognizable § 1983 claim absent evidence of physical assault or gesture. Id. at 1378-79 ("Although such conduct is not to be condoned, Officer Thomure's alleged conduct failed to rise to the level of a 'brutal' and 'wanton act of cruelty.'"). See also Doe v. Gooden, 214 F.3d 952, 955 (8th Cir. 2000) (finding that teacher's "yelling and screaming at students, using foul language, telling students that their handwriting 'sucks,' telling students that 'if you had one eye and half a brain, you could do this,' calling students 'stupid,' and referring to students as 'bimbos,' 'fatso,' and the 'welfare bunch'

was inappropriate and appalling, but did not violate the students' constitutional rights."); Martin v. Sargent, 780 F.2d 1334,1338-39 (8th Cir. 1985) (finding defendants' name calling and verbal abuse and verbal threats do not constitute a constitutional violation); Costello v. Mitchell Pub. Sch. Dist. 79, 266 F.3d 916, 921 (8th Cir. 2001) (finding teacher's verbal harassment of student, including daily instances of the teacher calling the student "retarded," "stupid," and "dumb" in front of her classmates, belittling her in front of the class for getting a bad grade, and throwing a notebook, which hit the student in her face, while "singularly unprofessional," was not "sufficiently shocking to the conscience to state a substantive due process claim."); Emmons v. McLaughlin, 874 F.2d 351, 354 (6th Cir. 1989) (finding appellant's asserted fear from appellee's "threat" that"I am going to get you . . ." is not an "actual infringement of a constitutional right, and thus, is not actionable under § 1983"); DeLeon, 981 F. Supp. at 735 ("Defendant's verbal harassment, while offensive, cannot be said to 'shock the conscience.'").

Likewise, the court finds the defendants' actions insufficiently conscience-shocking as to support § 1983 liability. Following Hansel's outburst at the January 28, 2002 council meeting, defendant McCorkindale counseled Hansel to refrain from similar conduct in the future, and there is no evidence that Hansel ever "acted up" again. It is undisputed that Hansel was calm and well-behaved at the January 31, 2002 meeting with the council and the street crew. Ultimately, it appears that the council and the mayor was aware of, and even witnessed some, if not all of Hansel's actions, but the parties could not agree on what constituted a reasonable assurance of safety to return the plaintiff to work, i.e., the plaintiff felt that Sueppel's letter assuring the plaintiff's safety was inadequate given Hansel's refusal to sign the written proposal. The defendants' actions, even taken in the light most favorable to the plaintiff, fall short of "shocking the conscience." Defendants' motion for summary judgment on plaintiff's substantive due process claim is granted.

Wrongful Discharge - Violation of Public Policy

The plaintiff alleges that his termination violated the public policy of the State of Iowa, in that it was based, in determinative part, on his expressions that the defendants' actions were violating various public policies including, but not limited to Iowa Code §§ 384.3, 362.5, 362.6, 384.85 and 312.6.[6] The defendant argues that summary judgment

---

[6]These code provisions provide as follows:

> Iowa Code § 384.3
>
> A proposed ordinance or amendment must be considered and voted on for passage at two council meetings prior to the meeting at which it is to be finally passed, unless this requirement is suspended by a recorded vote of not less than three-fourths of all of the members of the council. If a proposed ordinance, amendment or resolution fails to receive sufficient votes for passage at any consideration and vote thereon, the proposed ordinance, amendment, or resolution shall be considered defeated.
>
> Iowa Code 362.5
>
> When used in this section, *"contract"* means any claim, account, or demand against or agreement with a city, express or implied.
>
> A city officer or employee shall not have an interest, direct or indirect, in any contract or job of work or material or the profits thereof or services to be furnished or performed for the officer's or employee's city. A contract entered into in violation of this section is void. The provisions of this section do not apply to:
>
> 7. A contract in which a city officer or employee has an interest if the contract was made before the time the officer or employee was elected or appointed, but the contract may not be renewed.
>
> Iowa Code § 362.6
>
> A measure voted upon is not invalid by reason of conflict of interest in an officer of a city, unless the vote of the

(continued…)

is warranted on this claim as the undisputed facts show that the plaintiff was terminated for refusing to return to work following the exhaustion of his FMLA leave because he

---

[6](…continued)

> officer was decisive to passage of the measure. If a specific majority or unanimous vote of a municipal body is required by statute, the majority or vote must be computed on the basis of the number of officers not disqualified by reason of the conflict of interest. However, a majority of all members is required for a quorum. For the purposes of this section, the statement of an officer that the officer declines to vote by reason of conflict of interest is conclusive and must be entered of record.
>
> Iowa Code § 384.85
>
> 1. The governing body of each city utility, combined utility system, city enterprise, or combined city enterprise being operated on a revenue producing basis shall maintain a proper system of books, records, and accounts.
>
> 2. The gross revenues of each city utility, combined utility system, city enterprise, or combined city enterprise must be deposited with the treasurer of the governing body and kept by the treasurer in a separate account apart from the other funds of the city and from each other. The treasurer shall apply the gross revenues of each city utility, combined utility system, city enterprise, or combined city enterprise only as ordered by the governing body and in strict compliance with such orders, including the provisions, terms, conditions, and covenants of any and all resolutions of the governing body pursuant to which revenue bonds or pledge orders are issued and outstanding. If the council is the governing body, it may designate another city officer to serve as treasurer.
>
> Iowa Code § 312.6
>
> Funds received by municipal corporations from the road use tax fund shall be used for any purpose relating to the construction, maintenance, and supervision of the public streets.

disagreed with the city's assurances of his physical safety, not in retaliation for his protected conduct.

In Iowa, employment is presumed to be "at will." Graves v. O'Hara, 576 N.W.2d 625, 628 (Iowa Ct. App. 1998). This means that an employer may terminate an at will employee at any time for any reason or for no reason at all. Id. A discharge in violation of public policy is an exception to the at will employment doctrine. Lockhart v. Cedar Rapids Community Sch. Dist., 577 N.W.2d 845, 846 (Iowa 1998). "Thus, the modern employment at-will doctrine is perhaps more aptly described as one that permits termination at any time for any *lawful* reason, that is, a reason that is not contrary to public policy." Id. The elements of an action for wrongful discharge in violation of public policy are: "(1) engagement in a protected activity; (2) discharge; and (3) a causal connection between the conduct and the discharge." Fitzgerald v. Salsbury Chemical, Inc., 613 N.W.2d 275, 281 (Iowa 2000) (citing Teachout v. Forest City Community Sch. Dist., 584 N.W.2d 296, 299 (Iowa 1998)). Upon establishing this prima facie case of retaliatory discharge, the burden shifts to the defendant to articulate a legitimate, nonretaliatory reason for plaintiff's discharge. Yockey v. State, 540 N.W.2d 418, 422 (Iowa 1995). If the defendant meets its burden, the burden shifts back to the plaintiff to prove that the defendant's reason was pretext for retaliation. Id.

With respect to the first element, the plaintiff must identify a "clear public policy which would be adversely impacted if dismissal resulted from the conduct engaged in by the employee." Fitzgerald, 613 N.W.2d at 282.

> It is generally recognized that the existence of a public policy, as well as the issue whether that policy is undermined by a discharge from employment, presents questions of law for the court to resolve. . . . On the other hand, the elements of causation are factual in nature and generally more suitable for the finder of fact. Notwithstanding, to withstand summary judgment a plaintiff must not only satisfy the court on the public policy and jeopardy elements of the tort, but offer

> adequate evidence from which a lack of justification for termination can be inferred.

Id. (internal citations omitted). The courts' "insistence on using only clear and well-recognized public policy to serve as the basis for the wrongful discharge tort emphasizes our continuing general adherence to the at-will employment doctrine and the need to carefully balance the competing interests of the employee, employer, and society." Id. at 283. Upon identifying a clear public policy, the plaintiff must also show that the discharge for engaging in such conduct jeopardizes the public policy. "[T]his element requires the employee show the conduct engaged in not only furthered the public policy, but dismissal would have a chilling effect on the public policy by discouraging the conduct." Id. "This element guarantees en employer's personnel management decisions will not be challenged unless the public policy is genuinely threatened. . . . If a public policy exists, but is not jeopardized by the discharge, the cause of action must fail." Id. at 284 (internal citations omitted).

With respect to the third element, i.e., causation, the "protected conduct must be the determinative factor in the decision to terminate the employee." Id. at 289. "A factor is determinative if it is the reason that 'tips the scales decisively one way or the other,' even if it is not the predominant reason behind the employer's decision." Teachout, 584 N.W.2d at 302. The causation standard is high, which requires the court to determine whether a reasonable fact finder would conclude that the plaintiff's protected conduct was the determinative factor in the decision to discharge him. Fitzgerald, 613 N.W.2d at 289. Merely proving that an adverse employment action occurred after engaging in protected conduct, without more, is insufficient to generate a fact issue on causation. Graves, 576 N.W.2d at 628.

Defendants' motion for summary judgment on this claim is granted. The court finds that the undisputed facts support neither plaintiff's prima facie public policy claim, nor that the defendants' proffered reason for his termination was pretextual. With respect to the

first element of the plaintiff's prima facie case, i.e., the defendants assume, for summary judgment purposes only, that the plaintiff's reporting of the Hansel conflict of interest and Werger wage allocation issues implicates a well established and defined public policy of the State of Iowa. The defendant's concession on this point is accepted, although the court has doubts whether the plaintiff's actions do, in fact, implicate a clear and well-recognized public policy. The court further notes that the plaintiff has offered no evidence demonstrating how his discharge would discourage the protected conduct, thereby having a chilling effect on the policy.

With respect to the second element, i.e., an adverse employment action, the court rejects the defendant's argument that the plaintiff suffered no adverse employment action because the city council simply voted to accept the plaintiff's refusal to return to work as a "voluntary quit." The correspondence being exchanged by the parties leading up to the cessation of the plaintiff's employment with the city to not support the defendant's argument that the plaintiff voluntarily quit his job, notwithstanding the verbiage chosen by the council in voting to discharge the plaintiff. For purposes of summary judgment, the court finds that the plaintiff has satisfied the second element of his prima facie case.

Regarding the third element, i.e., causation, the court finds the plaintiff's evidence inadequate to support an inference that his termination violated the alleged public policies. Plaintiff's evidence linking his protected activity to his termination is simply too attenuated and speculative to survive summary judgment. The City of Elkader hired Werger and arranged for half of his salary to be paid from Road Use Funds in early September 2001. Upon learning of this arrangement, the plaintiff complained to then city administrator Ryan Heiar. The plaintiff raised the issue with defendant Carnes in January 2002 and once (at unspecified dates) to defendants Diers and McCorkindale. Plaintiff's termination occurred some six to nine months after these events, under a different city administrator, after the plaintiff exhausted all of his FMLA leave (and then some), and failed to return to work after disputing the reasonableness of the city's efforts to assure his physical safety.

Moreover, the record indicates that the conflict of interest issue was discussed and remedial measures decided upon, i.e., that Hansel would not vote on any issues involving Peopleservice, at the December 10, 2001 council meeting, over a month before Hansel was sworn in.

The plaintiff's theory is that his expressions of concern enraged Hansel whose wishes, despite the fact that he had only one vote out of five, became the commands of the other council members. In support of this theory, the plaintiff points to Hansel's outburst at the January 28, 2002 council meeting where Hansel shouted that Werger would never work for the plaintiff, and his comments about holding the plaintiff and his wife responsible for Mrs. Cook's opinion piece during the election. While Hansel and the plaintiff had battled over the use of Werger's time and labor, the plaintiff points to no evidence that Hansel was, in fact, aware that the plaintiff had questioned the use of road use funds to pay Werger's salary. There is no evidence that Hansel was actually aware of, or angered by, the plaintiff raising the potential conflict of interest issue. Moreover, the lapse in time between the plaintiff's expressing his concerns and his discharge is significant, and the correspondence and communication leading up to the plaintiff's discharge makes no mention of these issues whatsoever. Hansel had but one vote to terminate the plaintiff, and the vote was unanimous. That Hansel's wishes somehow became the commands of the other members of the council is pure speculation. For these reasons as well, the court finds that the undisputed facts fail to support a finding that the defendants' proffered reason for the plaintiff's termination, i.e., his refusal to return to work following the exhaustion of his FMLA leave, despite the city's reasonable assurances for his physical safety, is pretext for retaliatory discharge.

FMLA

The defendants claim that the court does not have subject matter jurisdiction over the plaintiff's FMLA claim because it is undisputed that the City of Elkader employed fewer than 50 people at all material times and therefore was not subject to the FMLA. The

defendants argue that the City of Elkader was not subject to the FMLA, notwithstanding its adoption of a FMLA policy on March 25, 2002, while the plaintiff was on leave, the city's apparent reliance on the FMLA to require the plaintiff obtain medical certification in support of his leave, the city's April 17, 2002 written approval of the plaintiff's April 13, 2002 request for FMLA leave, and the city's advising the plaintiff in writing on April 29, 2002 that he had not accrued any vacation, sick, or personal time "during the leave granted under the Family Medical Leave Act." See Plaintiff's Appendix at 60-65, 85, 94, 109-111. Alternatively, the defendants argue that they did not violate the FMLA in terminating the plaintiff's employment in that the plaintiff was afforded all of the leave required by the FMLA, and the city ended his employment only after the plaintiff refused to accept as adequate the city's assurances of his physical safety and return to work.

The plaintiff claims that the city employed 50 or more employees during the events leading to this lawsuit, including the paid volunteer firemen, the swimming pool manager and assistant, the library staff, city council members, the mayor, and the police department. The plaintiff further argues that the defendant is estopped from disclaiming FMLA coverage since it told the plaintiff several times during the March-May 2002 time period that his leave was covered by the FMLA. The plaintiff claims that he was terminated prior to exhausting all 12 weeks of FMLA leave. In support of this position, the plaintiff argues that the Department of Labor regulations prohibiting an employer from retroactively designating an employee's leave as "FMLA" leave, which were struck down by the Eighth Circuit Court of Appeals in Ragsdale v. Wolverine Worldwide, Inc., 218 F.3d 933 (8th Cir. 2000) and affirmed by the Supreme Court in Ragsdale v. Wolverine, Inc., 535 U.S. 81 (2002), should nonetheless apply in his situation since it was the city's behavior which not only caused the plaintiff's need for FMLA leave, but unnecessarily

extended the duration of his leave by failing to obtain reasonable assurances of his physical safety[7].

For purposes of summary judgment, the court finds that it does have subject matter jurisdiction over plaintiff's FMLA claim. First, there appears to be a fact issue with respect to the number of city employees, the hours they worked, their bases of compensation, etc., that the court feels is not properly resolved by a conclusory affidavit, devoid of any supporting facts (defendants' appendix at 123). Second, and more importantly, due to the defendants' prior and current positions with respect to the plaintiff's leave of absence, i.e, granting the plaintiff "FMLA" leave, but now denying that it was a covered employer for FMLA purposes, the court will address the substance of plaintiff's FMLA claims.

The record indicates that the plaintiff's FMLA leave began on February 8, 2002 and that the plaintiff was advised in writing on April 25, 2002 that he had used all 12 weeks of FMLA leave and that he was expected to return to work on Monday April 29, 2002. The plaintiff was subsequently allowed to use sick days from April 29, 2002 through May 6, 2002, and his unused vacation and/or personal days from May 6, 2002 to May 15, 2002. In a letter dated May 17, 2002, the city's attorney, Bill Sueppel, advised the plaintiff's attorney as follows:

> If Mr. Cook intends to retain his position he must return to work no later than May 28, 2002. . . . If Mr. Cook does not return to work by May 28, the City will consider his failure to return a voluntary quit and intends to take steps to fill the position of Public Works Director.

The plaintiff did not return to work and the council voted at its June 3, 2002 meeting to relieve him of his duties.

---

[7]The plaintiff claims that, under the regulations, his "FMLA" leave did not begin until mid-April, when the city approved his request for FMLA leave in writing.

In sum, the plaintiff was off of work in excess of 16 weeks. Generally speaking, the FMLA provides for 12 weeks of leave in a 12 month period. The plaintiff was advised that he would be terminated if he did not return to work on May 28, 2002. He did not return to work on that date. The court does not find that the defendants' April 25, 2002 designation of the plaintiff's leave as FMLA leave, commencing on February 8, 2002, to be a "situation[] in which an employer's failure to give notice may function to interfere with or to deny an employee's substantive FMLA rights." Ragsdale, 218 F.3d at 939 (noting examples where an employer's notice may interfere with or deny an employee's substantive FMLA rights, such as where the employee's sole reason for exceeding their FMLA leave was employer's failure to notify the employee that the leave was FMLA leave and the employee, if they had been so notified, would have returned to work at the end of the twelve weeks, and where the employer's failure to timely designate interferes with the employee's ability to plan and use future FMLA leave). The plaintiff has made no showing that he would have taken less leave, or returned to work if he had received earlier notice that his leave was FMLA leave. Ragsdale, 535 U.S. at 90 (noting that "[t]he challenged regulation is invalid because it alters the FMLA's cause of action in a fundamental way: It relieves employees of the burden of proving any real impairment of their rights and resulting prejudice."). The city terminated the plaintiff's employment when the plaintiff refused to return to work, after the parties were unable to agree on what constituted reasonable assurances of his physical safety. Summary judgment is granted on plaintiff's claim that the defendants violated the FMLA by terminating his employment prior to the exhaustion of his FMLA leave.

The plaintiff also claims that his discharge was due, in part, to the council's animosity toward him for exercising his FMLA rights, in violation of 29 U.S.C. § 2615(a)(1). In support of this claim, the plaintiff points to the defendant Diers' deposition testimony that he did not want the plaintiff to return to work following his FMLA leave because he thought he had "outworn his welcome" by "taking all that time

off." Plaintiff's Appendix at 32. Defendant Diers further testified that "the rest of the council, I think, thought the same way, that he'd just outworn his welcome" by "taking all of that time off. We realized he had to have some time off first and then he did that and then he just stayed and stayed and didn't come back." Id. The plaintiff also points to the fact that he was advised by the city administrator in March that at least part of the council wanted him fired at that time.

The defendants contend that there is no evidence to support the plaintiff's claim that the city refused to return him to work because he exercised his right to FMLA leave. According to the defendants, it is impossible to draw an inference that the city retaliated against him for exercising his FMLA rights when it not only approved the full extent of the plaintiff's FMLA leave, but also approved his use of sick and vacation days to extend his leave beyond that required by the FMLA. The defendants contend that the plaintiff's employment was terminated because he refused to return to work following the expiration of every authorized form of leave.

The court agrees with the defendant. It is undisputed that defendant Diers, as mayor, had no vote in terminating the plaintiff. There is no evidence that he influenced the vote in any way. That the mayor "thought" that other council members also thought that the plaintiff had "outworn his welcome" by "taking all of that time off" is insufficient from an evidentiary standpoint to withstand summary judgment, i.e., speculation. The only inference that can reasonably be drawn from the record before the court is that the plaintiff was not satisfied with the city's efforts to assure his safety, the plaintiff rejected the city's "final offer" in that regard, failed to return to work, and was terminated. While this was going on, he was off of work for over 16 weeks. Defendants' motion for summary judgment on plaintiff's FMLA retaliatory discharge claim is granted.

First Amendment Retaliation

The plaintiff claims that he was terminated in retaliation for exercising his First Amendment rights, i.e., expressing his opinions on the Hansel conflict of interest issue and

the Werger salary/labor allotment issue. The defendant claims that summary judgment should enter on this claim as there is no evidence from which a fact finder could conclude that the defendants took an adverse employment action against him, or that a causal connection existed between the protected activity and the end of his employment.

To establish a prima facie case of First Amendment retaliation, the plaintiff must show that he participated in a protected activity, that the defendants took an adverse employment action against him, and that a causal connection exists between the protected activity and the adverse employment action. Hudson v. Norris, 227 F.3d 1047, 1050-51 (8th Cir. 2000). Upon establishing his prima facie case, the burden then shifts to the defendants to articulate a non-retaliatory reason for the adverse employment action. Id. at 1051. The plaintiff must then prove that the defendants' proffered reason is pretextual. Id. Determining whether the First Amendment protects a public employee from discharge as a result of his speech involves a two-part judicial inquiry. Belk v. City of Eldon, 228 F.3d 872, 878 (8th Cir. 2000). First, the court must determine "whether the employee's speech can be 'fairly characterized as constituting speech on a matter of public concern.'" Id. (quoting Connick v. Myers, 461 U.S. 138, 146 (1983)). Assuming it does, the court must then "balance the 'interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Id. (quoting Pickering v. Board of Educ., 391 U.S. 563, 568 (1968)).

With respect to the first inquiry, "[m]atters of public concern include matters of political, social, and other concern to the community." Id. "Allegations of the misuse of public funds relate directly to citizens' interests as taxpayers, and are generally considered to address matters of public concern despite their personal pecuniary ramifications." Id. (citing Kincade v. City of Blue Springs, 64 F.3d 389, 396 (8th Cir. 1995); Casey v. City of Cabool, 12 F.3d 799, 803 (8th Cir. 1993)). However, "[w]hen a public employee's speech is purely job-related, that speech will not be deemed a matter of public

concern. . . . Unless the employee is speaking as a concerned citizen, and not just an employee, the speech does not fall under the protection of the First Amendment." Bauzard v. Meridith, 172 F.3d 546, 548 (8th Cir. 1999).

The court finds that the plaintiff's expressions of concern regarding both the Hansel conflict of interest issue and the Werger salary/labor allocation issue constitute speech on matters of public concerns. The court also finds that the plaintiff's interests as a citizen, in commenting upon matters of public concern outweigh the city's interests, as an employer, in promoting the efficiency of the public services it performs through its employees. There has been no evidence produced by the defendants that the plaintiff's expressions of concern disrupted the workplace. Belk, 228 F.3d at 882. The plaintiff has therefore satisfied the first element of his prima facie case. As set forth above, the court also finds that the plaintiff suffered an adverse employment action sufficient to satisfy the second element of his prima facie case. It is upon the third element, however, that the plaintiff's claim must fail. The plaintiff has produced no evidence from which the fact finder could reasonably conclude that the plaintiff's employment was terminated because he voiced his concerns about the Hansel and Werger issues. Plaintiff's protected speech occurred months prior to his termination and the record is devoid of any evidence demonstrating that it played any role in the council's unanimous decision to terminate the plaintiff's employment. Neither the Werger salary nor the Hansel conflict of interest issues were addressed in any of the correspondence and communication leading up to the plaintiff's termination.

Upon the foregoing,

IT IS ORDERED that the defendant's motion for summary judgment (docket number 34) is granted. Judgment shall enter in the defendants' favor on counts 1 (substantive due process), 3 (public policy wrongful discharge), 4 (FMLA), and

5 (First Amendment retaliation) of the plaintiff's second amended complaint and jury demand. Said counts shall be dismissed and the plaintiff take nothing.

January 21, 2005.

JOHN A. JARVEY
Magistrate Judge
UNITED STATES DISTRICT COURT